

IP 04-0060-CR 1 H/F US v Mabrey  
Magistrate Kennard P. Foster

Signed on 7/11/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Cause No. IP 04-60-CR-01 (H/F)
	)	
SCOTT AARON MABREY,	)	
	)	
Defendant.	)	

**MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

This matter is before the undersigned U. S. Magistrate Judge pursuant to the Order entered by the Honorable David F. Hamilton, Judge, on April 25, 2005 and June 23, 2005 designating this Magistrate Judge to conduct a hearing on the Petitions for Summons or Warrant for Offender Under Supervision, filed with the Court on April 20, 2005 and June 23, 2005, and to submit to Judge Hamilton proposed Findings of Facts and Recommendation for disposition under Title 18 U.S.C. §§3401(i) and 3583(e). All proceedings in this matter were held on July 1, 2005 pursuant to Title 18 U.S.C. §3583, and Rule 32.1(a)(1) of the *Federal Rules of Criminal Procedure*. The government appeared by Gayle Helart, Assistant United States Attorney. The defendant appeared in person with his appointed counsel, William Dazey, Office of Indiana Federal Community Defender. Robert Akers and Dwight Wharton, U. S. Parole and Probation Officers, appeared and participated in the proceedings.

The Court conducted the following procedures in accordance with Rule 32.1(a)(1) *Federal Rules of Criminal Procedure* and Title 18 U.S.C. §3583:

1. William Dazey, Office of Indiana Federal Community Defender, appointed counsel, was present to represent Mr. Mabrey in regard to the Petitions for Revocation of Supervised Release.

2. Copies of the Petitions for Revocation of Supervised Release were provided to Mr. Mabrey and his counsel who informed the Court that they had read and understood the specifications of each alleged violations and waived further reading thereof.

3. Mr. Mabrey was advised of his right to a preliminary hearing and its purpose in regard to the alleged specified violations of his supervised release contained in the pending Petitions.

4. Mr. Mabrey was informed he would have a right to question witnesses against him at the preliminary hearing unless the Court, for good cause shown, found that justice did not require the appearance of a witness or witnesses.

5. Mr. Mabrey was advised he had the opportunity to appear at the preliminary hearing and present evidence on his own behalf.

6. Mr. Mabrey was advised if the preliminary hearing resulted in a finding of probable cause that Mr. Mabrey had violated the alleged condition or conditions of supervised release set forth in the Petitions, he would be held for a revocation hearing before the undersigned Magistrate Judge, in accordance with Judge Hamilton's designations on April 25, 2005 and June 23, 2005.

7. Mr. Mabrey stated his readiness to waive the preliminary hearing at each hearing regarding the Petitions then under consideration. Mr. Mabrey then waived, in writing, the preliminary hearing and he was held to answer.

The parties stipulated the following in open Court:

(1) Mr. Mabrey and the government agreed they were ready to proceed to disposition on the pending Petitions

(2) Mr. Mabrey admitted that he committed the violations of specifications set forth in the Petitions to Revoke Supervised Release, filed with the Court on April 20, 2005 and June 23, 2005, as follows:

<u>Violation Number</u>	<u>Nature of Noncompliance</u>
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**April 20, 2005 Petition**

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| <b>1</b> | <b>The defendant shall participate in a program or testing and/or treatment for drug abuse as directed by the probation officer.</b> |
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On February 16, 2005, Mr. Mabrey submitted a urine specimen that tested positive for marijuana and cocaine. Upon initial confrontation, he adamantly denied illegal drug usage but soon admitted he used both drugs a couple of days before submitting the urine specimen. the defendant was moved to weekly substance abuse counseling and urine surveillance as a result of this violation. Additionally, he was warned continued drug use and/or other violations would not be tolerated. No action from the Court was recommended at that time. See Report on Offender Under Supervision dated February 23, 2005.

On March 9, 2005, the defendant failed to submit a urine specimen at Volunteers of America (VOA) per the above condition. On the following day, the probation officer visited Mr. Mabrey at his residence and obtained a urine sample. The results were subsequently negative for drug use and he claimed VOA refused to take a urine specimen upon his arrival on March 9, 2005. However, VOA staff indicated the defendant simply did not submit a sample. The probation officer instructed him to report for weekly urine collection and counseling without excuse. Mr. Mabrey failed to report for random urine collection on the following dates: 3/16/05, 3/26/05, 3/31/05, 4/2/05, 4/5/05, 4/6/05, 4/10/05 and 4/13/05. He has not submitted a urine specimen since March 10, 2005.

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| <b>2</b> | <b>The defendant shall perform 500 hours of community service as directed by the probation officer.</b> |
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| <b>3</b> | <b>The defendant shall answer truthfully all inquiries by the probation officer and follow instructions of the probation officer.</b> |
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Mr. Mabrey has been on supervision for approximately 13 months and he has completed only 29 hours of community service toward his 500-hour obligation. He had been instructed on a regular basis by his

former supervising officer to complete community service hours each month. The defendant consistently claimed he was completing the community service work as instructed; however, supporting documentation was never received. On January 31, 2005, this officer instructed Mr. Mabrey to complete at least 15 hours of community service per month. On three different occasions, he claimed he was completing the work at Goodwill Industries and/or the Salvation Army, both located near 86<sup>th</sup> and Michigan Road. On April 13, 2005, this officer visited both establishments for verification purposes. According to the managers at the respective agencies, Mr. Mabrey has never completed community service work at either location. His efforts to satisfy this special condition are unacceptable and he has been consistently untruthful to the probation officer.

Since his release from imprisonment, Mr. Mabrey has made four payments totaling \$275. Of that total, a \$100 payment was made on March 3, 2005. He has been gainfully employed for most of his supervision term, he has no dependents, and does not have significant debt. On April 15, 2004, the defendant was instructed to pay at least \$100 per month towards his fine obligation. The outstanding fine balance is \$3,020 (some payments were made during the incarceration portion of his sentence).

#### **June 23, 2005 Supplemental Petition**

- 5                   The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.**

On May 25, 2005, Mr. Mabrey submitted a random urine specimen at the Volunteers of America that was dilute. Dilute specimens hinder the ability of laboratory equipment to detect drugs in urine. On June 7, 2005, he submitted a random urine specimen that tested positive for cocaine. It was noted there is an unexecuted warrant for the defendant's arrest pursuant to the Petition for Warrant dated April 18, 2005. Since its issuance, he has sporadically submitted random urine specimens and attending counseling at the Volunteers of America as noted below.

- 6                   The defendant shall participate in a program of testing and/or treatment for drug abuse as directed by the probation officer.**

Since the Petition for Warrant dated April 18, 2005, Mr. Mabrey failed to report for random urine collection on the following dates:

4/27/05, 4/30/05, 5/15/05, 5/17/05, 5/21/05, 5/31/05, 6/4/05, 6/14/05 and 6/16/05. It is noted he reported for random urine collection on one occasion in March and April, and twice in June.

On February 22, 2005, Mr. Mabrey was instructed to attend one substance abuse counseling session per week following a positive urine test for marijuana and cocaine. He did not report for substance abuse counseling in April 2005. However, the defendant attended four sessions in May and two sessions in June.

(3) Mr. Mabrey has a relevant criminal history category of III.. *See*, U.S.S.G. §7B1.4(a).

(4) The most serious grade of violation committed by Mr. Mabrey constitutes a Grade B violation, pursuant to U.S.S.G. §7B1.1(b).

(5) Pursuant to U.S.S.G. §7B1.4(a) upon revocation of supervised release the range of imprisonment applicable to Mr. Mabrey is 8 to 14 months.

(6) The government and the defendant had an agreement as to the appropriate disposition.

8. The Court then placed Mr. Mabrey under oath and inquired directly of him whether he admitted committing violations of supervised release contained in the Petitions to Revoke Supervised Release. Mr. Mabrey admitted the above violations of his supervised release.

The Court, having heard the admissions of the defendant, the stipulations of the parties, and discussions on behalf of each party, **NOW FINDS** that the defendant, Scott Mabrey, violated the above-delineated conditions of his supervised release. The defendant's supervised release is therefore **MODIFIED**. Upon modification, Scott Mabrey is ordered to reside at the Volunteers of America Community Corrections Center for a period of up to 6 months and abide by their rules and regulations. The defendant will remain in custody until designation.

The Magistrate Judge recommends that Mr. Wharton, U. S. Parole and Probation officer, prepare for submission to the Honorable David F. Hamilton, as soon as practicable, a supervised release modification judgment, in accordance with these findings of facts, conclusions of law and recommendation.

Counsel for the parties and Mr. Mabrey stipulated in open Court waiver of the following:

1. Notice of the filing of the Magistrate Judge's Report and Recommendation;
2. Objection to the Report and Recommendation of the undersigned Magistrate Judge pursuant to Title 28 U.S.C. §636(b)(1)(B); Rule 72.b, *Federal Rules of Civil Procedure*, and S.D.Ind.L.R.72.1(d)(2), *Local Rules of the U. S. District Court for the Southern District of Indiana*.

**WHEREFORE**, the U. S. Magistrate Judge **RECOMMENDS** the Court adopt the above report and recommendation modifying Mr. Mabrey's supervised release.

**IT IS SO RECOMMENDED** this 11<sup>th</sup> day of July, 2005.

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Kennard P. Foster, Magistrate Judge  
United States District Court

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